Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

To: The Commission

REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit this reply to the Oppositions to Petitions for Reconsideration filed by the Building Owners and Managers, *et al.* ("Building Owners"), Time Warner, Inc. ("Time Warner") and the National Cable Television Association ("NCTA") in the above referenced docket. The Petitions seek reconsideration of various portions of the Commission's *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC No. 97-376 (released October 17, 1997)(*"R&O"*).

I. The First Amendment Rights of Viewers Take Precedence Over the Interests of the Real Estate Industry.

In opposing MAP/CFA's request that the Commission develop rules for the disposition of home run wiring that promote viewers' constitutionally-grounded access right to choose their video provider, the Building Owners claim that MAP/CFA "overstate[] the role of the First

Amendment and the rights of viewers in this proceeding." Building Owners Opp. at 5. A better solution, the Building Owners urge, would be for the Commission to "allow[] the real estate industry to find a market solution to the problem." *Id.*

This distortion of the Commission's public interest mandate ignores decades of Supreme Court precedent and the will of Congress. More importantly, it subordinates viewers' "paramount" First Amendment rights to the asserted ***property*** interests of landlords. As MAP has pointed out at great length in this docket, and specifically in its Petition for Reconsideration, the Supreme Court has repeatedly stressed the "paramount" right of viewers to receive a "multiplicity of voices" starting with its decision in *Associated Press v. FCC*, 326 U.S. 1 (1945) and continuing, more recently, with its decision in *Turner Broadcasting System v. FCC*, 114 S.Ct. 2445 (1994). *E.g.*, MAP/CFA Pet. at 9-12. Congress reiterated this imperative when it passed Section 624(i) of the 1992 Cable Act and Section 207 of the 1996 Telecommunications Act, which respectively gives "subscribers" and "viewers" the power to choose among MVPDs. *Id.* at 7-9, 13. There is no countervailing First Amendment interest which the landlords could assert, as they are not First Amendment speakers for the purposes of this proceeding.

Even more outrageously, the Building Owners evidence their true sentiments about the people who live in their properties, by affording them second class citizenship. They argue that "the First Amendment does not require that ***apartment residents*** have the right to choose between video programming providers," and that there is no "statutory provision that gives ***apartment residents*** identical rights to homeowners in the area of video programming selection." Building Owners Opp. at 5-6 [Emphases added]. This flippant attitude toward the rights of apartment dwellers *vis a vis* homeowners flies in the face of both the constitution and Congressional intent.

In repeatedly holding that the First Amendment includes a right for members of the public to receive access to a multiplicity of voices, the Supreme Court has never distinguished between whether a viewer was fortunate enough to own a home. Similarly, the plain language of Section 207 and Section 624(i) make no distinction between the two. In the absence of any Congressional intent to create a dichotomy between homeowners and renters, the Commission should not, and cannot, do so.

II. The Commission Has The Authority, and the Duty, to Consider the Effect of its Decision in this Docket on its Pending Decision in the Section 207 Proceeding.

The Building Owners support the Commission's decision not to "import" its Section 207 proceeding into this docket. Building Owners Opp. at 4. To do so, it claims, "would exceed the Commission's authority, and "also violate the notice provision of Section 4 of the Administrative Procedure Act." *Id.*

These unexplained legal musings demonstrate only that the Building Owners have misunderstood the relief that MAP/CFA seek. MAP/CFA have not asked the Commission to consolidate the two dockets, although this is something it certainly would have the authority to do. Rather, they have simply asked the Commission to consider, and give adequate weight to, the effect of its decision in this docket on its ongoing consideration of whether to preempt MDU owners' restrictions on DBS dishes and over-the-air antennas. MAP/CFA Pet. at 12-13. The Commission regularly and necessarily harmonizes its decisions with other decisions implementing its authority. *E.g.*, *Review of the Commission's Regulations Governing Television Broadcasting*, 11 FCCRcd 21655, 21659 & 21675-77 (1996) (seeking comment on whether the Commission's Digital TV proceeding will affect possible changes in the ownership rules). To suggest that the Commission does not have the authority to do so here, much less that it would be illegal to take

other statutory requirements into account, is preposterous. It is equally unfounded to suggest that such action would violate sound administrative practice.

Similarly unconvincing is the building owners claim that consideration of the Section 207 proceeding is unnecessary because

> this proceeding was initiated expressly to deal with issues arising out of the relationship among building owners, cable operators, and other providers of video programming with respect to distribution systems within buildings. The OTARD proceeding deals with the placement of over-the-air receiving devices. Those are two separate matters, which are not necessarily connected.

Building Owners Opp. at 5.

Reduced to its essence, the Building Owners argument is this: because home run wiring is inside the building, and dishes and antennas are outside, there is no relation between the two. The Commission should not take this argument seriously. As MAP/CFA and others have demonstrated, unless the Commission makes home wiring readily available to viewers, any decision it may make in the future to preempt restrictions on over-the-air reception devices in MDUs will be rendered irrelevant. MAP/CFA Petition at 12-13; Consumer Electronics Manufacturers Association Pet. at 4-5. Thus, the Commission abused its discretion when it did not consider the effects of its decision here on its pending Section 207 proceeding.

III. Requiring an Incumbent MVPD to Offer the Home Run Wire for Sale at a Predetermined Price Before it Can Choose to Remove the Wire Does Not Violate the Fifth Amendment.

Relying primarily on a decision later reversed by the U.S. Supreme Court, Time Warner opposes those Petitions for Reconsideration that urge the Commission to eliminate incumbent MVPDs' rights to elect to remove their wiring upon notice of termination from an MDU owner. Time Warner Opp. at 9-11 *citing, inter alia, Florida Power v. FCC*, 772 F.2d 1537 (1985) *rev'd*,

480 U.S. 245 (1987) (*"Florida Power"*). Time Warner claims that because elimination of the removal option leaves only the option to sell or abandon the home run wire, an incumbent MVPD's "bargaining leverage" with an MDU owner would be destroyed. Time Warner Opp. at 9. This loss of bargaining power, Time Warner asserts, would force the incumbent to abandon the wire. *Id.* at 10. This "forced abandonment" it argues, would constitute an unconstitutional taking. *Id. Accord*, NCTA Opp. at 2-4.

Even were this a valid legal principle,[1] the rationale employed by Time Warner does not apply to the position which MAP/CFA and DIRECTV have advanced. They asked the Commission to require an incumbent MVPD to first offer the wire for sale to the unit owner or MDU owner. Then, only if those parties declined to purchase it, would the incumbent have the option of removing or abandoning the wire. DIRECTV Pet. at 2-4; MAP/CFA Pet. at 16-17. Because the threat of removal still exists, albeit later in the process, incumbent provider retains leverage *vis a vis* the unit owner or MDU owner. As DIRECTV noted, this is the same scheme that governs home wiring, which to this day remains unchallenged by the cable industry. DIRECTV Pet. at 3 *citing Cable Home Wiring Order,* 8 FCCRcd 1435 (1993), *recon. granted in part and denied in part*, 11 FCC Rcd 4561 (1996).[2]

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[1]At a minimum, to the extent that Time Warner relies on *Florida Power, supra*, its argument is invalid. *See* discussion below at 6.

[2]NCTA argues that MAP/CFA and DIRECTV's proposal constitutes a "taking" for which the Commission lacks express statutory authority. NCTA Opp. at 4-6 quoting *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1446-47 (D.C. Cir. 1994). Even assuming, *arguendo*, that the proposal does constitute a taking, the Commission may ***imply*** such authority where it is "a matter of necessity." *Bell Atlantic*, 24 F.3d at 1446. The Commission has already found that rules concerning the disposition of inside wiring are "necessary" to effectuate several provisions of the Communications Act, as amended by both the 1992 Cable Act and the 1996 Telecommunications Act. *R&O* at ¶¶88-91. Indeed, the court in *Bell Atlantic* indicated that it might be

Similarly unchallenged is the Commission decision to adopt a "wholesale replacement value" sales price for home wiring, which DIRECTV urges the Commission also adopt for the sale of home run wiring. DIRECTV Petition at 4-5. But Time Warner claims that this price is "constitutionally invalid" because there has been no "opportunity for fair market value to be determined through an adjudication." Time Warner Comments at 12.

The Commission is not so limited in setting prices for home wiring. Indeed, the case upon which Time Warner principally relies for its argument was ***reversed*** on this very point by the Supreme Court. *Florida Power*, 480 U.S. at 253. In overturning the Eleventh Circuit's determination that the FCC's regulation of rates which a utility could charge cable TV companies to use its poles violated the takings clause, the Court stated

> It is beyond dispute that regulation of rates chargeable from the employment of private property devoted to public uses is constitutionally permissible....Such regulation of maximum rates or prices "may consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."

Id. [Citations omitted.]

Thus, as it did with home wiring, the Commission has the authority to determine a reasonable price for home run wire. A predetermined price would be far preferable to the complicated and expensive arbitration scheme the Commission has adopted in its *R&O*. Neither the Commission nor Time Warner has provided a legitimate legal or policy rationale for distinguishing between home wiring and home run wiring with regard to the latter's disposition and sale.

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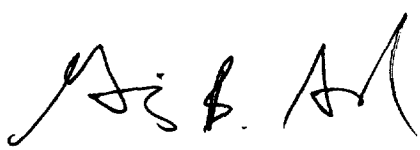
sufficient for the Commission to contend only that its "authority to regulate....in the public interest would be seriously hampered,...absent takings authority." *Id.* at 1446-47. *Accord*, Time Warner Opp. at 10 n. 25.

CONCLUSION

For the foregoing reasons, MAP/CFA ask that the Commission grant its Petition for Reconsideration, reverse the home run and cable home wiring portions of its *R&O*, adopt its proposal to move the demarcation point, and grant all such other relief as may be just and proper.

Respectfully submitted,



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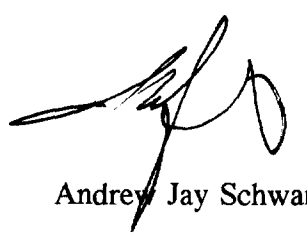

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CERTIFICATE OF SERVICE

I, Gigi B. Sohn, hereby certify that I have this 28th day of January, 1998, mailed by First Class mail, postage prepaid, the foregoing "Reply to Oppositions to Petitions for Reconsideration" to the following:

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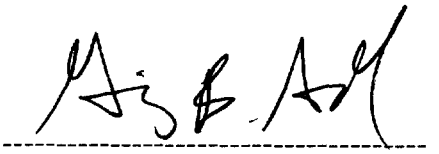

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